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No. 01-1289

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

REPLY BRIEF

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ARGUMENT

Between 1980 and 1994, State Farm handled more than 29,000 third-party bodily injury claims against its insureds in Utah. Of these 29,000, Mr. Campbell's case was the only instance where a State Farm insured was exposed even briefly to the possibility of execution on an excess verdict after a refusal by State Farm to settle within policy limits. To transform this single instance of conduct into a springboard for large punitive damages, plaintiffs, over State Farm's objections, presented to the jury massive amounts of evidence of out-of-state and dissimilar conduct. The Utah Supreme Court, in direct contravention of this Court's decision in *BMW*, extensively relied upon this evidence in reinstating the $145 million punitive award. Plaintiffs now seek to avoid review of the constitutional deficiencies of the Utah Supreme Court's decision by arguing waiver. Contrary to plaintiffs' assertions, State Farm clearly presented to the Utah Supreme Court and trial court the due process issues raised by the imposition of punitive damages based upon out-of-state and dissimilar conduct. These significant constitutional issues are preserved for and warrant review by this Court.

I. The Constitutional Issues Presented in State Farm's Petition Were Preserved in the Utah Courts.

State Farm fully preserved its due process arguments below. In its opening brief to the Utah Supreme Court, State Farm set forth these arguments in a section headed "THE PUNITIVE DAMAGES AWARD IS EXCESSIVE." Appellant's Br. at 71. Citing *BMW*, State Farm presented its extra-territoriality argument in a subsection entitled "It is unconstitutional to punish State Farm for conduct directed at insureds outside of Utah." *Id.* at 72. In other subsections, State Farm argued that, as a matter of due process, its conduct toward the Campbells, not its myriad alleged conduct toward other insureds, was the only legitimate basis for a punitive award. *See id.* at 75-89. State Farm made this argument clear by the very titles of its subsections. *See id.* at 72 ("The Punitive Award Here Must Be Limited to Punishing State Farm For Its Conduct Toward the Campbells"); *id.* at 75 ("A $25 Million Punitive Award For An Isolated Act of Third-Party Bad Faith Is Excessive Under . . . The Due Process Clause Of The Fourteenth Amendment To The United States Constitution").

State Farm also preserved these issues in replying to plaintiffs' cross appeal to the Utah Supreme Court of the trial court's remittitur of the punitive award from $145 million to $25 million. State Farm argued that its dissimilar conduct toward other insureds could not constitutionally be the basis for punitive damages. *See* Appellant's Reply Br. at 38-39. State Farm also reiterated its due process argument that punitive damages "may not be justified as punishment for conduct directed at insureds outside of Utah." *Id.* at 35.[1]

Plaintiffs also erroneously contend that, in the trial court, State Farm's constitutional arguments based upon extraterritoriality and dissimilarity were raised only in support of JNOV and new trial, and not in support of remittitur. In fact, State Farm raised those arguments in support of remittitur in its post-trial motion and briefing and at oral argument before the trial court. State Farm's motion for JNOV, new trial, or remittitur (a single document) listed the reasons for JNOV or a new trial, including that "[t]he punitive damages award is unsustainable because it is based on conduct occurring in other states in violation of the due process and commerce clauses and comity principles of the United States Constitution." Opp. App. at 40a. State Farm's motion concluded by stating that in the alternative State Farm moved for remittitur of the punitive damages award as excessive under Utah law and as a matter of constitutional due process. *Id.* at 41a. Contrary to plaintiffs' tendentious and misleading description of this motion, it is evident that State Farm's concluding al-

[1] Under this Court's rule, the fact that the Utah Supreme Court did not explicitly rule on State Farm's due process extraterritorial argument does not bar the Court's review of that issue. *See Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983). Moreover, contrary to plaintiffs' claim (Opp. at 17 n.6), State Farm's statement in its reply brief below that the extraterritoriality issue "hardly seem[ed] relevant" was *not* a waiver of that argument, but part of a sentence pointing out that plaintiffs in their cross-appeal appeared to have conceded that they could not rely "on non-Utah conduct to justify the $145 million award." Appellant's Reply Br. at 37 n.39. Plaintiffs' claims before the Utah Supreme Court that State Farm had waived or abandoned on appeal its constitutional extraterritoriality argument were confined to two footnotes (one in the evidentiary section of their 99 page opening brief and the other in their 51 page reply brief (Appellees' Br. at 37 n.24; Appellees' Reply Br. at 31 n.19)). Not surprisingly, the Utah Supreme Court did not make any ruling on waiver.

ternative prayer for remittitur was based upon all its due process/excessiveness arguments, including extraterritoriality.

State Farm's post-trial briefing also preserved these issues for review. In that briefing, State Farm did not include separate arguments in support of remittitur, but made a single set of arguments to support JNOV, a new trial, or alternatively remittitur. *See* Post-Trial Mem., 11/22/96, at 2 (introduction, asking trial court to grant JNOV, a new trial, or to order "a massive remittitur"). In the section of its brief entitled "THE AMOUNT OF PUNITIVE DAMAGES AWARDED IN THIS CASE IS UNSUSTAINABLE," State Farm states that it should "receive *either a new trial or a massive remittitur* because the punitive damages are excessive under Utah law" and in the next sentence that "*similar relief* [i.e., a new trial *or* a massive remittitur] is warranted because the punitive damages also are *grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution*." *Id.* at 88 (emphasis added). In a subsection entitled "It is Unconstitutional To Punish State Farm For Conduct Occurring Entirely Outside of Utah," State Farm discusses *BMW* and sets forth in detail its argument that "punish[ing] State Farm for the full course of its conduct throughout the country over a 20-year period was unconstitutional" and specifically objects to the punishment of appearance allowances, use of non-OEM parts and other first-party claims practices. *Id.* at 91-95. In its post-trial supplemental briefing and oral argument before the trial court, State Farm again argued as to the unconstitutionality of punishing extraterritorial and dissimilar conduct and the need, at minimum, for remittitur of the punitive award.[2]

[2] *See, e.g.*, Post-Trial Reply Mem., 6/26/97, at 67-68 (jury was not "entitled to sit in judgment of the entirety of State Farm's business practices over a 20-year period"; "[u]nder the Due Process, Commerce, and Full Faith and Credit Clauses, . . . the jury in this case was entitled to punish State Farm (if at all) for one thing and one thing only: the failure to settle the third-party claims against Mr. Campbell and any related conduct directed at the Campbells"; thus "State Farm is entitled to a new trial or, *at a bare minimum, a massive reduction in the punitive damages*") (emphasis added); Objection to and Mem. in Resp. to Plaintiffs' Surreply Mem., 11/14/97, at 69-73, 96 (under *BMW* punitive award unconstitutionally punished out-of-state conduct; "[b]ased on the foregoing, State Farm (continued...)

In addition, State Farm made constitutional objections to plaintiffs' use of testimony regarding dissimilar and extraterritorial conduct in a pretrial hearing on the effect of the *BMW* decision soon after it was issued. Pet. 168a-172a, 185a-188a. At the hearing, the trial court denied State Farm's motion to exclude such evidence. 189a,194a. After its ruling, the court clearly stated that it would consider *BMW* issues on a motion for remittitur, should remittitur become an issue. 189a-190a ("following a jury award the court has not in any sense, hopefully, indicated an inclination to abdicate its responsibility to consider issues of remittitur, or whatever, should that issue arise"). At the end of the hearing, the court further stated: "I think you certainly have available to you this decision [*BMW*], for whatever benefit it can give you. You brought it to the court's attention, the court's read it, we've heard argument, the court's ruled on it. As far as I'm concerned, that decision is fair game, and I think that you're more than entitled to rely on it in any way you wish to do so." 194a. Plaintiffs in their opposition misinterpret this language to mean that, in order to preserve its objection, State Farm would have to raise the issue again. That interpretation twists the court's words to make them mean precisely the opposite of what they clearly mean: namely, that State Farm had raised its due process objections, the court had ruled, and State Farm had preserved those issues for remittitur or appeal.[3]

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[2](...continued)
requests . . . a new trial conditioned on plaintiffs' failure to accept a remittitur of . . . the punitive damages"); Tr. of Oral Argument, 12/19/97, at 198-206, 214-19, 269-76 (State Farm's counsel extensively argued that punitive award contravened due process and *BMW* by punishing out-of-state and dissimilar conduct, and requested "that this award should be *massively reduced* if a new trial is not granted") (emphasis added).

[3] Plaintiffs assert that State Farm did not appeal the trial court's *in limine* ruling on *BMW*. Opp. at 16 n.5. As plaintiffs well know, that ruling was the subject of an immediate petition for mandamus by State Farm to the Utah Supreme Court. Nor, as a matter of basic hornbook law, was State Farm required to appeal that ruling after trial. Such preliminary rulings merge with the judgment and are not appealed separately. In addition, plaintiffs are incorrect in stating in their opposition that State Farm argues "for the first time ever" that this issue was preserved at the trial level based on its oral argument in a pretrial hearing. *Id.* State Farm made precisely this argument in its post-trial briefing, stating that "[o]nce a (continued...)

Furthermore, in arguing waiver, plaintiffs lose sight of the purposes for this Court's "not pressed or passed-upon" rule, namely, that "questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind," and "due regard for the appropriate relationship of this Court to state courts." *Gates*, 462 U.S. at 221. Plaintiffs improperly attempt to use waiver to avoid review of due process issues that have been central in this case since the pre-trial hearing where State Farm raised this Court's newly issued decision in *BMW*. Pet. 167a-194a. The record here is well developed, and these issues were fully presented to the Utah courts.

II. The Utah Supreme Court's Reinstatement of the $145 Million Punitive Award Unconstitutionally Punishes Out-of-State and Dissimilar Conduct

Plaintiffs attempt to dissuade this Court from granting review by claiming incorrectly that State Farm is asking the Court to conduct a fact-intensive review as to whether the 27,000 page record supports the $145 million punitive damages award by the jury in this case. State Farm seeks review of the legal issues raised by the Utah Supreme Court's decision: namely, its unconstitutional punishment of out-of-state and dissimilar conduct and its misapplication of the *BMW* guideposts. In reinstating the $145 million punitive award, the Utah Supreme Court expressly cited as worthy of punishment an alleged twenty-year nationwide "scheme" comprising conduct and practices by State Farm that were dissimilar and unrelated to the alleged bad faith failure to settle third-party claims of which plaintiffs complain. Moreover, a large part of the conduct specifically referenced by the Court as deserving punishment clearly and indisputably occurred outside Utah. There is no need to speculate (as plaintiffs assert) what particular conduct the jury intended to punish. The issues presented by State Farm's petition are the legal constitutional issues raised by the Utah Supreme Court's reasons for reinstating the $145 million punitive award.

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[3](...continued)
party has raised an issue in a pre-trial motion and the trial court has rejected the party's position, the issue is preserved." Objection to and Mem. in Resp. to Pls. Surreply Mem., 11/14/97, at 71-72 (citing cases).

Plaintiffs incorrectly contend that the $145 million punitive award is merely the unreviewable result of State Farm's strategy of asking for bifurcation of the proceedings below. Opp. at 25, 29. The inherent and substantial unfairness in this case arose not from bifurcation, however, but from the trial court's decision, over State Farm's constitutional and evidentiary objections, to admit massive amounts of evidence of extraterritorial and dissimilar conduct. Contrary to plaintiffs' claims, most of this evidence was admitted as part of plaintiffs' affirmative case. In any event, plaintiffs' contentions that this evidence was properly admitted under Utah evidence law for one purpose or another are beside the point. The issue now is that, regardless of the purported reasons for which this evidence was admitted, the Utah Supreme Court clearly and unambiguously relied upon it in reinstating the $145 million award, in contravention of *BMW*.

In particular, the Utah Supreme Court repeatedly cites as deserving punishment alleged acts of discrimination by State Farm against "vulnerable groups" (Pet. at 18a-19a, 20a, 34a), which the record clearly establishes occurred in California and Colorado and had nothing to do with this case. Plaintiffs do not dispute that "[t]here was no evidence of any consistent policy or practice of discrimination in Utah." Pet. at 11. Nor do plaintiffs dispute the fact that they never made any claim or put on any proof that they themselves were discriminated against or "targeted" because of age, race, gender or other "vulnerability." *Id.* Nor was there any finding by either the Utah Supreme Court or the trial court that State Farm discriminated against or targeted the Campbells. Having failed below to make any connection between State Farm's conduct toward the Campbells and the extensive testimony by plaintiffs' witnesses regarding alleged out-of-state discrimination, plaintiffs now attempt to insinuate a connection by labeling the Campbells "typically vulnerable Utah consumers"[4] and stating that "[t]here is no basis to suggest that State Farm was

[4] Plaintiffs' witness Ray Summers, the former State Farm employee who handled the Campbell car accident, offered no testimony that he or anyone else at State Farm "targeted" or discriminated against the Campbells. Plaintiffs' citations for the proposition that the Campbells were a "vulnerable" retired couple (Opp. at 9) come from the trial court's findings on emotional distress and have nothing to do with discrimination.

punished for discrete actions in California or Colorado." Opp. at 18. To the contrary, the Utah Supreme Court made plain that it relied upon alleged acts of discrimination, which occurred in California and Colorado, as justification for the punitive award. *See* Pet. at 18a-19a, 20a, 34a.

Likewise, with regard to State Farm's investigation of former employee Ina DeLong, plaintiffs improperly argue that "[n]othing in the record suggests that State Farm was punished *by this jury* for that investigation." Opp. at 19 (emphasis added). Again, the issue here is not what the jury may have done, but the constitutionality of the Utah Supreme Court's decision. That decision makes explicit (Pet. at 19a) that in reinstating the $145 million award, the Court was punishing State Farm for its investigation of DeLong – an investigation that (as plaintiffs do not dispute) took place in California and had no connection to Utah or this case.

Indeed, the Utah Supreme Court throughout its decision makes clear that it is punishing State Farm not just for its treatment of the Campbells but for its alleged nationwide "PP&R scheme."[5] Pet. at 6a, 18a, 20a, 37a, 43a. This purported "scheme" consisted almost entirely of a variety of first-party claims practices, such as specification of non-OEM parts, appearance allowances, and "first contact" settlements, that had nothing to do with State Farm's alleged bad faith failure to settle the third-party claims against Mr. Campbell. Contrary to plaintiffs' contentions (Opp. at 19), that the Utah Supreme Court lists these practices in its discussion of Utah evidentiary issues (Pet. at 37a) does not alter the fact

[5] Plaintiffs' attempt to pretend that State Farm was not tried and punished for its conduct nationwide is rebutted by their counsel's opening statement, in which he asked the jury to punish State Farm "for what it's doing across the country." Pet. at 3. Similarly, the following colloquy between plaintiffs' counsel and expert Gary Fye demonstrates their strategy of trying State Farm as an institution for its conduct nationwide: "Q. To your knowledge, Mr. Fye, has any other trial that you have been involved in had the extent and scope of evidence regarding State Farm's wrongful practices throughout the country as this case, here before this jury? A. No." R.10267:112. Plaintiffs' expert Stephen Prater also told the jury that "this case is . . . about State Farm's pattern and practice nationwide. . . . The case is about more than what happened in Utah, is my point. That's why I'm here talking about all this other stuff." R.10273:160-61.

that when the Court states that it is punishing State Farm for its nationwide PP&R scheme, these are the practices it is talking about.[6] The Court's "scheme" analysis led to a punitive damages inquiry that was completely untethered to the single, isolated failure to settle within policy limits at issue in this case. In utilizing an analysis of "pattern" or "scheme" so broad in scope as to include virtually any activity engaged in by State Farm over twenty years, the Court unconstitutionally punished a wide array of out-of-state and dissimilar conduct. The precedent established by the Utah Supreme Court could be construed to authorize a roving inquiry into a corporate defendant's nationwide business practices and conduct over decades whenever a plaintiff claims that the defendant's specific conduct at issue was part of an improper "pattern" or "scheme." Such an unbounded expansion of the punitive damages inquiry contravenes the basic due process principles set forth in *BMW* and warrants a grant of certiorari.

III. The Utah Supreme Court Fundamentally Misapplied the *BMW* Guideposts

A. Reprehensibility. Plaintiffs attempt to recast State Farm's arguments on reprehensibility as being directed toward the "factual" findings underlying the Utah Supreme Court's reprehensibility analysis. Opp. at 22. In so doing, plaintiffs erroneously seek to bring the legal constitutional errors committed by the Utah Supreme Court (and trial court) under a deferential "clearly erroneous" standard of review. This Court has made clear that where (as here) a court's analysis of reprehensibility is based upon "improper predicates" and "questionable conclusions" that undermine the basis for the punitive award, that analysis cannot "survive *de novo* re-

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[6] Plaintiffs erroneously attempt to gloss over the significant legal and factual differences between these first-party claims practices and State Farm's failure to settle the third-party claims against Mr. Campbell. *See* Pet. at 16 n.9. Moreover, even if these first-party claims practices could be applied by State Farm to third-party claimants, they would have no relevance to the punitive damages in this case. If, for example, State Farm specified non-OEM parts for the repair of a third-party claimant's car, that conduct (and the other discrete practices at issue) would have nothing to do with State Farm's isolated refusal to accept the offer by the third-parties here to settle their claims against Mr, Campbell, the subsequent excess verdict, and the other circumstances of this case.

view." *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 441-42 (2001). Plaintiffs' own discussion of reprehensibility, with its repeated references to State Farm's alleged "high level corporate scheme" and "widespread pattern" of "cheat[ing] its customers" (Opp. at 22), demonstrates State Farm's point – that the Utah Supreme Court unconstitutionally assessed the reprehensibility of and punished conduct that was dissimilar and unrelated to the failure to settle the third-party claims against the Campbells.[7] *See* Pet. at 22-25.

B. Ratio. Plaintiffs improperly minimize the ratio here and inflate the ratios approved by this Court in *TXO* and *Haslip*, which plaintiffs contend were 526 to 1 and 200 to 1 respectively. Opp. at 24. In *BMW*, 517 U.S. at 581, this Court made plain that in *TXO* the "relevant ratio was not more than 10 to 1" and that in *Haslip* the relevant ratio was slightly "more than 4 times the amount of compensatory damages." As this Court stated in *Haslip* and repeated in *BMW*, a ratio of 4 to 1 is "'close to the line.'" *BMW*, 517 U.S. at 581 (quoting *Haslip*, 499 U.S. at 23-24).[8] Moreover, as both Utah courts recognized, for the application of the ratio guidepost, the compensatory damages here are $1 million.

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[7] Plaintiffs attack (Opp. at 23) the unrebutted testimony of Buck Moskalski, State Farm's regional vice-president, who stated that the Campbell case was the only third-party excess verdict case in Utah in which a State Farm insured was exposed to personal liability even for a brief period. Mr. Moskalski was able to testify with precision as to Utah excess verdicts because the trial court ordered and State Farm carried out a state-wide search for records and documents regarding such cases. There is no reason to suppose that there are other hidden excess verdicts against State Farm insureds that nobody knows about. Plaintiffs' witness Samantha Bird, a former State Farm claims superintendent in Utah, testified that neither she nor anyone she supervised had *ever* had a trial result in a verdict higher than State Farm's highest settlement offer.

[8] To the extent (as plaintiffs contend) "some lower courts have permitted conspicuously high ratios while others have not" (Opp. 25), such disparities only illustrate the need for further guidance from this Court. In any case, in the decisions cited by plaintiffs with high ratios, the compensatory damages were nominal or small, unlike the substantial compensatory damages here. *See Lee v. Edwards*, 101 F.3d 805, 811 (2d Cir. 1996) (noting nominal damages as justification for high ratio); *Southeastern Sec. Ins. Co. v. Hotle*, 473 S.E.2d 256, 259-61 (Ga. App. 1996) (compensatory damages of $1 against each defendant); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 148 (Iowa 1996) (low compensatory damages).

Pet. at 144a; 27a n.9. Thus, the ratio of the reinstated punitive award to compensatory damages is an extreme 145 to 1.

Contrary to plaintiffs' contentions, no "highly factbound" review or "credibility determinations" are necessary to conclude that this ratio exceeds due process limits, and that the Utah Supreme Court's approval of this ratio was skewed by its improper consideration of unrelated and dissimilar conduct. *See* Pet. at 18-22. Furthermore, contrary to plaintiffs' claim (Opp. at 18), there is "no long line of precedent from this Court" that supports the Utah Supreme Court's punishment of unrelated and dissimilar conduct nationwide. In *TXO*, 509 U.S. at 450-51, on which plaintiffs rely, this Court made clear that the defendant's other conduct consisted of "*similar* nefarious activities in business dealings." (emphasis added); *see also id.* at 462 n.28 ("similar past conduct" may be considered); *Haslip*, 499 U.S. at 21-22 (same); *BMW*, 517 U.S. at 563-64, 577 (evaluating reprehensibility in light of other nearly identical failures by BMW to disclose pre-sale repairs).

C. Comparable Penalties. Plaintiffs do not address the fundamental due process issue raised by the Utah Supreme Court's analysis of this guidepost: namely, whether a punitive award should be measured against the penalties available for conduct comparable to the defendant's conduct toward the plaintiffs, or whether the comparable penalties analysis may be expanded (as was done by the Utah Supreme Court) to include penalties theoretically available for the defendant's various business practices and conduct over many years. *See* Pet. at 25-28. Far from being a "factbound" issue (Opp. at 28), this issue is a legal constitutional argument that merits review by this Court. Plaintiffs also do not contend that the Utah Supreme Court chose relevant state statutes or penalties for its analysis, but merely assert that the Court's analysis is somehow immune from constitutional review. This Court reviewed the comparable penalties available under state law in *BMW*, 517 U.S. at 584, and should do so here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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